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In the Supreme Court of the United States

OCTOBER TERM, 1947

No.

C. D. JOHNSON LUMBER CORPORATION, a
corporation,

Petitioner,

vs.

OREGON MESABI CORPORATION, a corporation,
Respondent.

C. D. JOHNSON LUMBER CORPORATION, a
corporation,

Petitioner,

vs.

OREGON MESABI CORPORATION, a corporation,
Respondent.

**PETITION FOR WRITS OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT
AND
BRIEF IN SUPPORT THEREOF**

PETITION FOR WRITS OF CERTIORARI

To The Honorable the Supreme Court of the United
States:

Your petitioner, C. D. Johnson Lumber Corporation, a corporation, through its counsel, respectfully petitions this Honorable Court for writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the decrees of that Court, entered December 12, 1947, in the cases entitled Oregon Mesabi Corporation, appellant, vs. C. D. Johnson Lumber Corporation, appellee, Docket No. 11569, and Oregon Mesabi Corporation, appellant, vs. C. D. Johnson Lumber Corporation, appellee, Docket No. 11570, reversing the judgments of the District Court of the United States for the District of Oregon.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

These two actions were brought in the Circuit Court of the State of Oregon for the County of Lincoln by C. D. Johnson Lumber Corporation, a Nevada corporation, duly qualified for the doing of business in Oregon and operating a sawmill at Toledo, Oregon, for the condemnation of two rights-of-way over the lands of respondent, Oregon Mesabi Corporation, a Delaware corporation, for use as roads in transporting timber and other raw products of the forest from timberlands owned by petitioner to its sawmill at Toledo. The first right-of-way is 60 feet wide and slightly over a mile in length. The other right-of-way is a spur road taking off at a midway point of the first right-of-way and is 60 feet

wide and about a quarter mile long (11569 R. 2-8; 11570 R. 2-3).

These actions were filed pursuant to Chapter 2, Title 12 of the Oregon Compiled Laws Annotated, which statutes were passed following the adoption by referendum of an amendment to Article I, Section 18, of the Oregon Constitution. The rights-of-way involved traverse rough and sparsely populated lands valuable almost entirely for the timber thereon. Following the filing of these actions, respondent removed them to the District Court of the United States for the District of Oregon (11569 R. 8-22; 11570 R. 4-6).

The cases proceeded to trial before the District Court (McColloch, J.) on the issue of necessity for the taking (11569 R. 183-304), followed by a jury trial on the issue of damages (11569 R. 304-653). The two cases were consolidated for trial (11569 R. 77; 11570 R. 17).

At the trial petitioner introduced in evidence, over objections by respondent, (plats of surveys) Exhibits 9 (Case 11569) (11569 R. 197, 311, 715) and 10 (Case 11570) (11569 R. 201, 365, 716), showing the location of the rights-of-way sought to be condemned, and related Exhibits 11 (paper locations) (11569 R. 203, 374)* and 12 (profiles) (11569 R. 205, 378)*. The rights-of-way sought to be condemned were described in petitioner's complaints (11569 R. 4-6; 11570 R. 2-3) and were staked out on the ground (11569 R. 239, 240, 250, 256,

*Exhibits 11 and 12 considered in original form by Circuit Court of Appeals for Ninth Circuit.

261, 364, 402, 403, 451, 452). The witnesses' testimony, both as to necessity and as to value, was based upon a view of the actual location of the rights-of-way as staked out on the ground as well as shown on (plats of surveys) Exhibits 9 and 10 and related Exhibits 11 (paper locations) and 12 (profiles) (11569 R. 239, 240, 250, 256, 361, 364, 402, 403, 451, 452).

The surveys were conducted under the supervision and control of petitioner's logging superintendent, who is a registered engineer and whose duties included superintending the laying out of all roads and superintending petitioner's surveys in the regular course of petitioner's business (11569 R. 194). Said Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378) were compiled from field notes of the surveys made under his direction and supervision and with his help and were sponsored by him as being correct representations of results of the surveys (11569 R. 197, 200, 203, 204, 374, 378).

After the trial separate orders were issued "adjudging use and necessity," and separate verdicts were filed and separate judgments entered (11569 R. 79-100; 11570 R. 19-28).

Respondent appealed from the judgments of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit, contending, among other things, that the District Court erred in admitting in evidence said Exhibits 9, 10, 11 and 12 (plats of sur-

veys), and that the District Court erred in instructing the jury in each case that the interest acquired by the petitioner is an unlimited easement, subject to the right of the respondent to make such necessary crossings of the rights-of-way as will not interfere with the use of the rights-of-way by petitioner, for its logging purposes, respondent contending that the interest acquired by the petitioner in each case is a qualified fee title (11569 R. 727-750; 11570 R. 42-45).

Petitioner contended that said Exhibits 9, 10, 11 and 12 (plats of surveys) were admissible in evidence under both Oregon law and Federal law. Petitioner further contended that the lower court correctly instructed the jury as to the quantum of interest to be acquired by petitioner in the condemnation proceedings.

The Circuit Court of Appeals rendered its opinions, reversing the judgment of the lower court on two main grounds (11569 R. 742-752; 11570 R. 62): (1) that Oregon law was applicable and that Oregon law did not permit the introduction into evidence of said plats of surveys, Exhibits 9, 10, 11 and 12 (11569 R. 751-752); (2) that the failure of the District Court to make a finding as to whether the reasonably necessary right-of-way should be *exclusive* or *ordinary* prevented the proper determination of the measure of damages in each case (11569 R. 748-759).

The Circuit Court of Appeals entered its decrees reversing the judgments of the District Court (11569 R. 753; 11570 R. 63).

A petition for rehearing of said cases was denied by the Circuit Court of Appeals (11569 R. 762-763; 11570 R. 72-73).

STATEMENT ON JURISDICTION

The statutory provision under which it is contended that the Supreme Court of the United States has jurisdiction upon writs of certiorari to review the decrees of the United States Circuit Court of Appeals for the Ninth Circuit is (Judicial Code, Section 240, amended) Title 28, U.S.C.A. § 347.

The specific grounds for the contention are:

(1) The United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of Federal law, namely, the applicability in the Federal courts of the Federal Business Records Acts, 49 Stat. 1561, c. 640, 28 U.S.C.A. § 695, to the admission of evidence in condemnation proceedings instituted under state law, which question has not been, but should be, settled by this Court.

(2) The United States Circuit Court of Appeals for the Ninth Circuit has rendered decisions in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in

Westchester County Park Commission v. United States (1944) 143 F. (2d) 688,

on the matter of the applicability of Rules of Civil Pro-

cedure, 28 U.S.C.A. foll. § 723c, on appeal in condemnation proceedings.

(3) The United States Circuit Court of Appeals for the Ninth Circuit, in holding that the District Court erred in admitting the plats of surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374 and 12 (11569 R. 205, 378), as part of the oral testimony of the witness who verified them, has decided an important question of evidence in condemnation proceedings in the Federal courts, which question has not been, but should be, settled by this court.

(4) The United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of local law, namely, the interest acquired by the condemnor in condemnation proceedings under Oregon statutory law, in a way probably in conflict with applicable local decisions.

(5) The Supreme Court of the United States has repeatedly granted writs of certiorari in cases involving the exclusion or admission of evidence when such exclusion or admission affected the substantial rights of the parties.

Connecticut Mutual Life Insurance Co. v. Union Trust Co. (1884) 112 U.S. 250, 5 S. Ct. 119, 28 L. ed. 708.

French v. Hall (1886) 119 U.S. 152, 7 S. Ct. 170, 30 L. ed. 375.

Throckmorton v. Holt (1901) 180 U.S. 552, 21 S. Ct. 474, 45 L. ed. 663.

Leach & Co., Inc. v. Peirson (1927) 275 U.S. 120, 48 S. Ct. 57, 72 L. ed. 194.

Williams v. Great Southern Lumber Company (1928) 277 U.S. 19, 48 S. Ct. 417, 72 L. ed. 761.

QUESTIONS PRESENTED

The questions herein presented are as follows:

(1) Whether, in a District Court of the United States in a condemnation proceeding instituted pursuant to state law, plats of surveys, duly authenticated and made in the regular course of business and where it was the regular course of such business to make such plats, are admissible in evidence under the Federal Business Records Act where a specific state statute pertaining to the admission in evidence of a survey (plats of survey) exists in the state in which the District Court sits.

(2) Whether Rule 43 (a) of the Rules of Civil Procedure is applicable in a condemnation proceeding on appeal from a judgment of a District Court.

(3) Whether plats of a survey verified by a witness who testified to a personal knowledge of all the facts contained therein and who vouched for the accuracy of such facts were admissible as a part of the oral testimony of such witness.

(4) Whether Rule 61 of the Rules of Civil Procedure is applicable in a condemnation proceeding on appeal

from a judgment of a District Court.

(5) Whether the Circuit Court of Appeals for the Ninth Circuit failed to apply the applicable local law as to the interest acquired by petitioner in the lands of respondent.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Petitioner submits that this Court should review the decisions of the United States Circuit Court of Appeals for the Ninth Circuit for the following reasons:

(1) Whether, in a District Court of the United States in a condemnation proceeding instituted pursuant to state law, plats of surveys, duly authenticated and made in the regular course of business and where it was the regular course of such business to make such plats, are admissible in evidence is an important question of Federal law which has not been but should be settled by this court.

(2) The decisions of the Circuit Court of Appeals for the Ninth Circuit in the instant cases, in failing to apply the Federal Rules of Civil Procedure upon appeal of a condemnation case, are in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in

Westchester County Park Commission v. United States (1944) 143 F. (2d) 688, 694.

(3) The United States Circuit Court of Appeals for the Ninth Circuit, in holding that the District Court

erred in admitting the plats of surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378), as part of the oral testimony of the witness who verified them, has decided an important question of evidence in condemnation proceedings in the Federal courts, which question has not been, but should be, settled by this court.

(4) The United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of local law, namely, the interest acquired by the condemnor in a condemnation proceeding under the Oregon statute, in a way probably in conflict with applicable local decisions.

Argument in support of these points is included in the attached brief.

WHEREFORE, your petitioner prays that writs of certiorari issue under the seal of this court to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify, and to send to this Court, a full and complete transcript of the records and of the proceedings of said Circuit Court had in

Oregon Mesabi Corporation, appellant, vs. C. D.
Johnson Lumber Corporation, appellee.
Docket No. 11569

Oregon Mesabi Corporation, appellant, vs. C. D.
Johnson Lumber Corporation, appellee.
Docket No. 11570

to the end that these causes may be fully reviewed and

all matters and issues determined by this Court as provided for by the statutes of the United States; that the decrees of the United States Circuit Court of Appeals for the Ninth Circuit in these cases be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated April 1, 1948.

KING, WOOD, MILLER & ANDERSON,
ROBERT S. MILLER,
926 American Bank Building,
Portland 5, Oregon,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. _____

C. D. JOHNSON LUMBER CORPORATION, a
corporation,

Petitioner,

vs.

OREGON MESABI CORPORATION, a corporation,
Respondent.

C. D. JOHNSON LUMBER CORPORATION, a
corporation,

Petitioner,

vs.

OREGON MESABI CORPORATION, a corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

PROCEEDINGS IN COURTS BELOW

A. Original jurisdiction of these causes by the District Court of the United States for the District of Oregon was obtained under Sec. 41 (1) (Judicial Code, Section 24, amended) Title 28, U.S.C.A., providing that

such District Court shall have original jurisdiction of civil suits at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00 and is between citizens of different states.

B. November 1, 1946, the District Court of the United States for the District of Oregon entered orders adjudging the use and necessity of the condemnation of rights-of-way for logging roads across respondent's land (11569 R. 79-85; 11570 R. 19-20).

C. November 13, 1946, the judgments of the District Court of the United States for the District of Oregon were entered and filed (11569 R. 93-100; 11570 R. 22-28).

D. December 12, 1947, the opinions of the United States Circuit Court of Appeals for the Ninth Circuit were rendered and filed (11569 R. 742-752; 11570 R. 62). Neither opinion has been officially reported at the time of preparation of this brief.

E. December 12, 1947, the decrees of the United States Circuit Court of Appeals for the Ninth Circuit were entered and filed (11569 R. 753; 11570 R. 63).

F. March 3, 1948, a petition for rehearing of said cause was denied by the United States Circuit Court of Appeals for the Ninth Circuit (11569 R. 762, 763; 11570 R. 72-73).

G. March 8, 1948, the United States Circuit Court of

Appeals for the Ninth Circuit filed orders staying issuance of mandates.

JURISDICTION

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240, Judicial Code, amended, Title 28, U.S.C.A. § 347.

Petitioner further invokes the jurisdiction of this Court on the basis of the statement on jurisdiction included in the preceding petition (pp. 6 to 8) and by reference adopts those statements herein. In order to conserve the time of the Court, petitioner will not repeat or elaborate upon said statements except to submit further argument herein to support the conclusion that the United States Circuit Court of Appeals for the Ninth Circuit erred in reversing the judgments of the District Court of the United States for the District of Oregon.

STATEMENT OF FACTS

The statement included in the preceding petition (pp. 2 to 6) is hereby adopted and by reference made a part of this brief for purposes of brevity.

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals for the Ninth Circuit erred in applying Oregon law in determining the admission in evidence of the plats of the

surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374)* and 12 (11569 R. 205, 378)*.

2. The United States Circuit Court of Appeals for the Ninth Circuit erred in failing to hold that under the Federal Business Records Act the plats of surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378) were admissible in evidence.

3. The United States Circuit Court of Appeals for the Ninth Circuit erred in not complying with the mandate of Rule 43 (a), Rules of Civil Procedure, under which an appellate court, in the event of an appeal from a district court, is required to admit all evidence which is admissible under the statutes of the United States.

4. The United States Circuit Court of Appeals for the Ninth Circuit erred in failing to hold that the plats of the surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378) were admissible in evidence as part of the oral testimony of petitioner's witness who verified them.

5. The United States Circuit Court of Appeals for the Ninth Circuit erred in failing to give effect to Rule 61, Rules of Civil Procedure, under which a harmless error in the admission of evidence is not grounds for reversible error.

*Exhibits 11 and 12 considered in original form by Circuit Court of Appeals for Ninth Circuit.

6. The United States Circuit Court of Appeals for the Ninth Circuit, in reversing the decision of the District Court for the latter's failure to find whether the interest acquired by the condemnor in a condemnation proceeding instituted under a state statute was an *exclusive* or *ordinary* use, erred in deciding an important question of local law in a way probably in conflict with applicable local decisions.

SUMMARY OF ARGUMENT

As a summary of the argument under each of the above Specification of Errors, petitioner refers the Honorable Court to the statement of "Reasons Relied on for the Allowance of the Writ" included in the preceding petition (pp. 9 to 10) and adopts the same by reference as a part of this brief.

Petitioner summarizes its argument as follows:

I.

Evidence Tending to Establish the Location of the Rights-of-Way Sought to Be Condemned Was Properly Admitted in the District Court in the Condemnation Proceedings Instituted Pursuant to Oregon Law

A. The United States Circuit Court of Appeals for the Ninth Circuit erred in applying Oregon law in determining the admission in evidence of the plats of the surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569

R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378):

B. The plats of the surveys, said Exhibits 9, 10, 11 and 12, were admissible in evidence under the Federal Business Records Act.

C. Rule 43 (a) of the Rules of Civil Procedure requires an Appellate Court, in the event of an appeal from the District Court, to admit all evidence which is admissible under the statutes of the United States. One of those statutes is the Federal Business Records Act under which the plats of the surveys, said Exhibits 9, 10, 11 and 12, were admissible in evidence.

D. The plats of the surveys, said Exhibits 9, 10, 11 and 12, were admissible in evidence as a part of the oral testimony of petitioner's witness who verified them.

E. The Circuit Court of Appeals was required to give effect to Rule 61 of the Rules of Civil Procedure. Therefore, if any error was committed, admitting into evidence the plats of the surveys, said Exhibits 9, 10, 11 and 12, such error was harmless and nonprejudicial and did not constitute reversible error.

II.**The District Court Correctly Applied the Applicable Local Law as to the Quantum of Interest Acquired by the Condemnor in Condemnation Proceedings Instituted Pursuant to Oregon Law**

A. The Oregon law grants to the condemnor the right to take the minimum interest necessary for the completion of its purpose.

B. The District Court correctly applied the local law.

C. The Circuit Court of Appeals erred in reversing the decision of the District Court on the ground that its failure to make a finding as to whether the use of the rights-of-way to be taken was to be *exclusive or ordinary* constituted reversible error.

ARGUMENT**Point I.****Evidence Tending to Establish the Location of the Rights-of-Way Sought to Be Condemned Was Properly Admitted in the District Court in the Condemnation Proceedings Instituted Pursuant to Oregon Law**

A. The United States Circuit Court of Appeals for the Ninth Circuit erred in applying Oregon law in determining the admission in evidence of the plats of the

surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378).

B. The plats of the surveys, said Exhibits 9, 10, 11 and 12, were admissible in evidence under the Federal Business Records Act.

Rule 81 (a) (7), Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c,

provides as follows:

"In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable."

Therefore, in the District Courts of the United States in condemnation proceedings the Rules of Civil Procedure do not apply, and it is necessary to resort to another body of law to find the controlling rules.

28 U.S.C.A. § 724, R. Stat. 914,

commonly known as the Conformity Act, provides as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

This act generally has not been applied to rules of evidence.

Connecticut Mutual Life Insurance Co. v. Union Trust Co. (1884) 112 U.S. 250, 5 S. Ct. 119, 28 L. ed. 708.

Camden & Suburban Railway Co. v. Stetson (1900) 177 U.S. 172, 20 S. Ct. 617, 44 L. ed. 721.

Nashua Savings Bank v. Anglo-American Land, Mortgage & Agency Co. (1903) 189 U.S. 221, 23 S. Ct. 517, 47 L. ed. 782.

Moore's Federal Practice (1938) Vol. 3, p. 3057.

28 U.S.C.A. § 725, *R. Stat.* 721,

commonly known as the Rules of Decision Act, provides as follows:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Rules of Decision Act has generally been considered to be applicable to rules of evidence.

Connecticut Mutual Life Insurance Co. v. Union Trust Co., *supra*.

Camden & Suburban Railway Co. v. Stetson, *supra*.

Nashua Savings Bank v. Anglo-American Land, Mortgage & Agency Co., *supra*.

Moore's Federal Practice, *supra*.

The Rules of Decision Act has been uniformly construed as requiring the Federal courts in the trial of all civil cases at common law, not within the exceptions

named, to observe as rules of decision the rules of evidence prescribed by the laws of the states in which such courts are held.

Connecticut Mutual Life Insurance Co. v. Union Trust Co., supra.

A condemnation proceeding is considered in the nature of a suit at common law.

Kohl v. U. S. (1876) 91 U.S. 367, 23 L. ed. 449.

Consequently, under the Rules of Decision Act, the laws of Oregon as to the admission or exclusion of evidence in the District Court for the District of Oregon in a condemnation proceeding will control unless a Federal statute or a treaty or the Constitution of the United States provides otherwise.

Section 87-306, O.C.L.A., relied upon in the instant cases by the Circuit Court of Appeals which held that plats of surveys, Exhibits numbered 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378), were erroneously admitted in evidence by the District Court, has no application for the reason that a Federal statute is applicable.

The applicable Federal statute is the Federal Business Records Act, adopted on June 20, 1936,

49 Stat. 1561 c. 640, 28 U.S.C.A. § 695,
which provides:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

It is a well settled rule that where Congress has legislated on a question of the admission of evidence and prescribed a definite rule for the government of its courts it is to that extent exclusive of any legislation of the states in this same manner.

Whitford v. Clark County (1886) 119 U.S. 522, 7 S. Ct. 306, 30 L. ed. 500.

Connecticut Mutual Life Insurance Co. v. Schaefer (1877) 94 U.S. 457, 24 L. ed. 251.

Ex parte Fisk (1885) 113 U.S. 713, 5 S. Ct. 724, 28 L. ed. 1117.

Southern Pacific Co. v. Denton (1892) 146 U.S. 202, 13 S. Ct. 44, 36 L. ed. 942.

Tot v. United States (1943) 319 U.S. 463, 467, 63 S. Ct. 1241, 87 L. ed. 1519.

In the instant cases the plats of surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378), were writings or records made in the regular course of petitioner's business, and it was the regular course of petitioner's business to make such writings or records at the time of making surveys. The record abundantly shows that petitioner was and is engaged in logging and cutting and removing timber from timberlands in Lincoln County, Oregon.

The individual directing the surveys was an experienced and competent surveyor, and it was within his regular duties to make surveys (11569 R. 194-197, 325). The individuals on the survey team were acting in the regular course of their employment (11569 R. 317, 325, 336, 365, 368-369, 378).

The plats of the surveys were properly admitted in the District Court, and the rights-of-way sought to be condemned were adequately described by such evidence.

The Circuit Court of Appeals, in holding that the plats of the surveys were not admissible under Oregon law, was in error. The Federal Business Records Act was applicable and should have been applied.

For examples of records which have been admitted under the Federal Business Records Act or similar state statutes see:

- Backun v. U. S.* (CCA 4, 1940) 112 F. (2d) 635 (laundry ticket).
U. S. v. Mortimer (CCA 2, 1941) 118 F. (2d) 266, cert. den. 314 U.S. 616, 86 L. ed. 496, 62 S. Ct. 58 (charts showing defaults in payment of taxes).
Zurich v. Wehr (CCA 3, 1947) 163 F. (2d) 791 (logbook of tug).
Thompson v. Machado (1947, Dist. Ct. of Appeal, 3rd Dist., Cal.) 178 P. (2d) 838 (sales tag).
Gallagher v. Portland Traction Co. (1947) 44 Or. Advance Sheets 787, 182 P. (2d) 354 (hospital record).
Douglas Creditors Association v. Padelford (1947) 44 Or. Advance Sheets 761, 182 P. (2d) 390 (index card record of physician).

cf.

- Heike v. U. S.* (1913) 227 U. S. 131, 33 S. Ct. 226, 57 L. ed. 450.
Palmer v. Hoffman (1943) 318 U. S. 109, 113, 63 S. Ct. 477, 87 L. ed. 645.
Northern Pac. Ry Co. v. Keyes et al. (1898, C.C. N.D.) 91 Fed. 47, 59.
Wightman v. Campbell (1916) 217 N.Y. 479, 112 N.E. 184.
 20 Am. Jur., Evidence, § 983.

C. Rule 43 (a) of the Rules of Civil Procedure requires Circuit Courts of Appeal to apply the "more generous rule" as to the admission of evidence. Under said rule the Circuit Court of Appeals for the Ninth Circuit erred in not complying with the mandate of said rule pursuant to which the plats of the surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716),

11 (11569 R. 203, 374) and 12 (11569 R. 205, 378), were properly admissible in evidence.

Rule 81 (a) (7), Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c,

provides as follows:

"In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable."

On appeal the Rules of Civil Procedure are applicable.

Rule 43 (a) of the Rules of Civil Procedure, provides in part as follows:

" * * * All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. * * *"

Rule 43 (a) of the Rules of Civil Procedure above quoted makes it mandatory upon a Circuit Court of Appeals, in the event of an appeal from a District Court, to admit all evidence which is admissible under the statutes of the United States. One of those statutes is the Federal Business Records Act,

49 Stat. 1561 c. 640, 28 U.S.C.A. § 695 (supra, p. 23),

under which plats of surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378) were admissible in evidence.

The Circuit Court of Appeals erred in failing to conform to the mandate of Rule 43 (a) of the Rules of Civil Procedure and specifically in failing to apply the more liberal rule of evidence, that is, the Federal Business Records Act, supra, as to the admissibility of the plats of surveys in the instant case. The Circuit Court of Appeals for the Ninth Circuit, in failing and refusing to conform to the mandate of Rule 43 (a) of the Rules of Civil Procedure, rendered an opinion in conflict with that of another Circuit Court of Appeals.

In

Westchester County Park Commission v. United States (1944) 143 F. (2d) 688, 694-695,

the District Court in a condemnation proceeding had permitted the introduction into evidence of certain testimony regarding sales of similar property. This might have constituted reversible error under the New York law. The Circuit Court of Appeals for the Second Circuit refused to reverse the judgment of the District Court and stated:

"For, as under Rule 81 (a) (7), 28 U.S.C.A. following section 723c, the new rules of procedure are applicable to appeals in condemnation cases, we must, under Rule 43 (a), apply the more generous

rule of evidence; therefore, the federal 'harmless error' statute (28 U.S.C.A. § 391) governs; under that statute, the admission of the testimony was surely harmless."

Also see:

- Wittmayer et ux v. United States* (CCA 9, 1941) 118 F. (2d) 808 (Rule 52 (a) held applicable on appeal).
United States v. Lambert (CCA 2, 1944) 146 F. (2d) 469.
United States v. Delano Park Homes (CCA 2, 1944) 146 F. (2d) 473.
Iriarte v. United States (CCA 1, 1946) 157 F. (2d) 105.
Porrata et al. v. United States (CCA 1, 1947) 158 F. (2d) 788.
Atwater Kent Mfg. Co. v. United States (D.C. Pa., 1943) 53 F. Supp. 472.

D. *The plats of the surveys were admissible in evidence as part of the testimony of petitioner's witness.*

The plats of the surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378) were properly admitted in evidence as part of the oral testimony of petitioner's witness Jacoby who supervised the making of the surveys. These exhibits were verified by this witness, who testified to a personal knowledge of all the facts contained therein and vouched for the accuracy of such facts (11569 R. 197, 202-204, 309-310, 320, 323-324). The four exhibits were but pictorial representations of the results of the survey upon the ground. They were,

therefore, admissible as a part of his oral testimony as a representation of his own knowledge under general rules of evidence.

Wigmore on Evidence (3rd Ed. 1940) 791, 793, 794.

Seabrook v. Coos Bay Ice Co. (1907) 49 Or. 237, 89 Pac. 417, 419.

Cody v. Black (1920) 97 Or. 343, 348, 191 Pac. 319, 192 Pac. 282.

Walling v. Van Pelt (1930) 132 Or. 243, 246, 285 Pac. 262, 263.

Portland & Seattle Ry. Co. v. Ladd (1907) 47 Wash. 88, 91 Pac. 573, 574-575.

Portland & Seattle Ry. Co. v. Clarke County (1908) 48 Wash. 509, 93 Pac. 1083.

Lewis v. Carr (1933) 177 Ga. 761, 171 S.E. 298.

Rieke v. Kentucky Utilities Co. (1929) 231 Ky. 700, 22 S.W. (2d) 98.

Also see:

Northern Pacific Railway Co. v. Keyes et al.
(C.C. N.D. 1898) 91 Fed. 47, 59.

Petitioner's witness Jacoby testified that he had directed an engineer employed by petitioner to make the survey of the rights-of-way sought to be condemned (11569 R. 197-199, 200-205, 310, 313, 317-318, 335-336). In the very nature of surveying, it is required that more than one man participate in making the survey, but the responsibility was that of Jacoby's, and it was, in accordance with normal surveying practice, his surveyor's license which vouched for the accuracy of the surveys although the field work was done partly by others. He

testified that he was responsible for the survey as pictured on Exhibits 9 and 10, that he checked the work of the men in the field and supervised their activities (11569 R. 197-199, 200-205, 310, 314). Furthermore, he also testified as to the accuracy and preparation of Exhibits 11 and 12 (11569 R. 335-336, 338-339). Exhibit 11 shows the same center line traverse as Exhibits 9 and 10, the same engineer's stations, and is, in fact, a part of the same survey. This may be said also of Exhibit 12 as far as elevations are concerned. The witness Jacoby not only supervised and directed the preparation of these exhibits but also did a great deal of the field work himself.

The Circuit Court of Appeals for the Ninth Circuit erred in holding that the plats of surveys, Exhibits 9, 10, 11 and 12, were not admissible in evidence as a part of the oral testimony of petitioner's witness who verified them.

E. If the admission in evidence of the plats of surveys was, in fact, error, it was harmless error and under Rule 61, Rules of Civil Procedure, the Circuit Court of Appeals should not have reversed the decision of the District Court.

The plats of the surveys were admissible both as surveys and as a part of the oral testimony of the witness who verified them; there was uncontroverted testimony that the survey as staked out upon the ground corresponded with the rights-of-way proposed to be

condemned; if any error occurred in regard to the admission of the surveys, it was harmless and nonprejudicial.

Testimony was given that the proposed roads, as staked out in the creek bottom, corresponded with the roads sought to be condemned (11569 R. 239-240, 324-325). The witness who superintended the taking of the survey so testified, and his testimony was not contradicted in any way. Such being the case, any error in the admission of Exhibits 9 (11569 R. 197, 311, 715) and 10 (11569 R. 201, 365, 716), if such error there was, was harmless, for all the witnesses testified to the value of the land as staked out and to the damages resulting from the appropriation of such roads, without objection on that ground.

All of the witnesses who testified as to the damages resulting to respondent by reason of the condemnation of the two rights-of-way by petitioner premised their opinions upon the assumption that petitioner was condemning the rights-of-way shown by the stakes (11569 R. 452, 490, 495, 499, 526, 528, 392, 402-403, 411-412); therefore, the plats of surveys identified as Exhibits 9 and 10 were not absolutely essential to the determination of the case, and their admission in evidence, even if, in fact, erroneous, did not and could not result in substantial prejudice to respondent and, at worst, could be but harmless error under Rule 61 of the Rules of Civil Procedure, which rules are applicable on the ap-

peal of a condemnation proceeding in the Federal courts (supra, p. 26).

If a technical error was committed by the trial court in admitting the exhibits of the survey, it was harmless error, it did not affect the substantial rights of the parties, and under said Rule 61 it was not a ground for the reversal of the District Court's judgments.

United States v. Miller (1943) 317 U.S. 369, 63 S. Ct. 276, 87 L. ed. 336.

Westchester County Park Commission v. United States, supra.

Atwater Kent Mfg. Co. v. United States, supra.

See also:

28 U.S.C.A. § 391.

Point II.

The District Court Correctly Applied the Applicable Local Law as to the Quantum of Interest Acquired by the Condemnor in Condemnation Proceedings Instituted Pursuant to Oregon Law

With respect to the interest acquired by the condemnor under Oregon law, numerous decisions have interpreted the interest acquired. It is well established that a fee title could not be condemned by petitioner.

O. R. & N. Co. v. Oregon Real Estate Co. (1882)
10 Or. 444, 445-446.

The condemnor was entitled only to the minimum interest necessary for the fulfillment of its purpose. It was not entitled to more than an easement.

Coos Bay Logging Co. v. Barclay (1938) 159 Or. 272, 79 P. (2d) 672.

Warm Springs Irrigation District et al. v. Pacific Live Stock Co. (CCA 9, 1921) 270 Fed. 560, 562.

Western Union Telegraph Co. v. Polhemus et al. (CCA 3, 1910) 178 Fed. 904, 906-907.

Shedd v. State Line Generating Co. (CCA 7, 1930) 41 F. (2d) 505, 507.

18 *Am. Jur., Eminent Domain*, Sec. 115, 120, 121, pp. 741, 744-745.

30 *C.J.S., Eminent Domain*, § 451, p. 207.

155 *A.L.R. Anno.* 381.

Section 12-202, O.C.L.A.,

relating to condemnation of "logging roads" provides as follows:

"Any such person, firm or corporation shall have the right to acquire and own all lands reasonably necessary for said logging road or way to promote the transportation of logs or the raw products of the forests. If such person, firm or corporation is unable to agree with the owners of the land over which said logging railroad is necessary, as to the amount of compensation to be paid therefor, such person, firm or corporation shall have the right to condemn so much of the land necessary for such logging railroad, road or ways as may be necessary for the use of such way, road or logging railway, and may maintain a suit for the condemnation thereof in the circuit court of the county wherein said lands are located; provided, that no land shall be taken here-

under until compensation therefor has been assessed and tendered as herein provided."

The jury was correctly instructed by the District Court, in accordance with the court's statement to counsel for both petitioner and respondent prior to the jury trial on the issue of damages, in substance that petitioner would get an unlimited easement (that is, unlimited as to time) and that respondent could cross over these rights-of-ways so long as such crossings did not interfere with petitioner's use of the rights-of-way for its logging purposes (11569 R. 639-640, 643). There could be no question in the minds of the members of the jury as to what interest was sought to be condemned. The instructions of the District Court to the jury were in conformity with the local law.

Nevertheless, in spite of this correct application of the local law by the District Court, the Circuit Court of Appeals held the District Court to be in error in failing to determine whether the use of the condemned property was to be exclusive or ordinary. The holding of the Appellate Court that the question as to whether the rights-of-way were for petitioner's exclusive use was left undetermined by the lower court is entirely incorrect and unjustified.

Coos Bay Logging Co. v. Barclay (1938) 159 Or. 272, 284, 79 P. (2d) 672.

The rights-of-way were not for petitioner's exclusive use. It was for the District Court to determine what the na-

ture of the rights sought to be taken by petitioner should be. Under the authorities petitioner was entitled to the minimum right needed to accomplish its purpose, and the court, at the conclusion of the hearing on necessity, determined that that did not call for exclusive use by petitioner (11569 R. 295-299). There is nothing in the form of the findings and order on necessity about exclusive use, and certainly those orders should be interpreted in the light of the full discussion which the court and counsel had before the findings and order on necessity were entered (11569 R. 295-299).

In the interests of justice and to prevent unnecessary litigation, these causes should not be reversed and remanded for retrial on issues already adjudicated.

CONCLUSION

Point I.

The plats of the surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378), were properly admitted in evidence:

- (1) Under the Federal Business Records Act;
- (2) As a part of the oral testimony of petitioner's witness who verified them.

The Circuit Court of Appeals was required to give effect to Rule 43 (a) of the Rules of Civil Procedure. If it had done so, the plats of the surveys, said Exhibits 9,

10, 11 and 12, would clearly have been admissible under the applicable Federal statute, to-wit, Federal Business Records Act.

The Circuit Court of Appeals was required to give effect to Rule 61 of the Rules of Civil Procedure. Therefore, if any error was committed in admitting into evidence the plats of the surveys, said Exhibits 9, 10, 11 and 12, such error was harmless and nonprejudicial and did not constitute reversible error.

Point II.

The District Court of the United States for the District of Oregon correctly determined the interest acquired by the petitioner in the lands of respondent. New trials on that issue are not required.

We respectfully submit that the Circuit Court of Appeals for the Ninth Circuit erred in reversing the judgments of the District Court of the United States for the District of Oregon.

We respectfully request that writs of certiorari be issued as prayed for.

Respectfully submitted,

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